BENTLEY TERRACE DILLARD, as an individual, and as Trustee of The Bentley Terrace Dillard Family Trust dated February 1, 2002, Plaintiff/Third-Party Defendant/Appellee, v. MARK E. SCHLUSSEL, an individual, Defendant/Third-Party Plaintiff/Appellant.
1 CA-CV 10-0219
COURT OF APPEALS STATE OF ARIZONA DIVISION ONE DEPARTMENT C
Filed: May 10, 2011

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BEEXCEPT AS AUTHORIZED BY APPLICABLE RULES.See Ariz. R. Supreme Court 111(c); ARCAP 28(c);Ariz. R. Crim. P. 31.24
MEMORANDUM DECISION(Not for Publication-Rule 28, Arizona Rules of Civil Appellate Procedure)
Appeal from the Superior Court in Maricopa County
Cause No. CV2005-016198
The Honorable Jeanne M. Garcia, Judge
AFFIRMED

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Page 2

DOWNIE, Judge

¶1 Mark Schlussel ("Schlussel") appeals from a judgment entered against him after a grant of partial summary judgment and a jury verdict. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

I. The Launch Of A Little More Red

¶2 Schlussel, Bentley Terrace Dillard ("Dillard"), and Glen Lineberry ("Lineberry") formed "A Little More Red" ("ALMR"), an Arizona limited liability company, during the summer of 2002. ALMR sold art to architects and interior designers.

¶3 Initially, Schlussel and Dillard each held a 41.25 percent interest in ALMR, and Lineberry held the remaining 17.5 percent interest. Dillard later assigned her interest to the Bentley Terrace Dillard Family Trust ("Trust"), of which Dillard is trustee (the "Trustee"), effective April 30, 2003. Lineberry was ALMR's president and was responsible for the company's day-to-day operations.

¶4 The ALMR members decided to initially fund the company with a $500,000 line of credit from Salomon Smith Barney ("Smith Barney"). The Trust provided a guarantee of payment by ALMR to Smith Barney, secured by Trust assets. Schlussel signed an Agreement and Guarantee of Mark E. Schlussel (the "Guarantee"), which stated, in relevant part:

Page 3

> 1. In the event the Company fails to repay the Debt [sums extended under the Line of Credit] to Salomon Smith Barney according to its terms, Guarantor hereby guarantees payment of up to one half of the Debt outstanding at the time of any default, said sum not to

> exceed $250,000 plus costs and fees as herein provided.
> 2. This guarantee is an absolute continuing and unlimited personal guarantee of payment without regard to the regularity, validity, or enforceability of any liability or obligation of the Company.
> ....
> 8. Guarantor hereby waives a) the benefit of any defense against the enforcement of this Guarantee including without limitation the right to require the Family Trust to proceed against the Company; proceed against or exhaust any security or right of set off; proceed against any other guarantor or pursue any other remedy whatsoever, b) any defense arising from or by reason of any disability or by reason of the cessation from any cause whatsoever (other than payment in full) of the underlying debt and c) all rights and/or privileges Guarantor might otherwise have to require the Family Trust to pursue any other remedy available to it against the Company in any particular manner or order under the legal or equitable doctrine or principle of marshaling and further agrees that the Family Trust may proceed against any or all security or right of set off in such order and manner as the Family Trust in its sole discretion may determine.

Page 4

II. Financial Issues

¶5 During its first year of operations, ALMR nearly exhausted funds available through the line of credit. In January 2003, Dillard and Schlussel each agreed to contribute half the amounts necessary to continue operating ALMR. Later that month, Schlussel told Dillard he was having cash flow problems and indicated he could put money toward either the line of credit or the business, but not both. On January 24, 2003, Schlussel sent Dillard an e-mail stating, in relevant part:

> I especially want to thank you for your support on the Trust loan. It was very meaningful to me that you offered to cover me and I would work it out with you. This gave me the ability to fund my ½ of the ongoing burn rate so that we can make ALMR into a huge success we both believe it will be.

By the end of 2003, Dillard had loaned ALMR $177,000, Schlussel had loaned $164,436.83, and Lineberry had loaned $40,000. Schlussel also contributed $2500 in January 2004, $10,000 in March 2004, $25,000 in June 2004, and $5000 in August 2004. Schlussel's total contribution was $206,936.83. By early 2004, ALMR had relocated to the Bentley Projects in an effort to save money.[1]

Page 5

¶6 ALMR obtained a $100,000 loan from Norman Pappas and Philip Elkus in 2004, which sustained company operations until the end of June 2004. Dillard made a $125,000 payment on the line of credit in August 2004. Dillard communicated with Schlussel about moving or refinancing the line of credit, and Schlussel responded that he was working on it. By October 2004, Dillard was insisting that Schlussel move the line of credit to his own bank so that her bonds could be released. To Dillard, this meant that Schlussel would pay his share of the line of credit, or $207,500. Meanwhile, Bentley Gallery had been advancing a series of payments to ALMR totaling $68,647.72, beginning in January 2003.

¶7 With no additional investors on the horizon, the members made a collective decision

to suspend ALMR's operations. Schlussel was advised of the steps being taken to shut down ALMR and admitted at trial he did not object to Dillard's e-mails recommending they split the "open payables" to Bentley Gallery before paying Pappas and Elkus.

¶8 As of December 2, 2004, the line of credit balance was $345,455.52. On December 3, 2004, the Trustee initiated payments from the line of credit of: (1) $85,000 to the Trust, and (2) $67,000 to Bentley Gallery (collectively, the "December Payments"). Regarding the $85,000 payment, Dillard testified the Trust had contributed $127,500 to the line of credit, and

Page 6

Schlussel had paid $42,500. Dillard drew $85,000 from the line of credit and had a check in that amount made payable to the Trust, thereby equalizing the Trust's and Schlussel's payments. Dillard contended the equalization was warranted under her agreement with Schlussel, circa April 2002, to equally share ALMR's expenses. Dillard testified Schlussel agreed to the $85,000 transaction, though he later objected. Dillard also testified the Bentley Gallery check was issued after receiving e-mail authorization from Schlussel and securing his consent via telephone. At trial, Schlussel denied ever approving the December payments, but agreed that, without the equalization payment, he would have received a $42,500 windfall as to the line of credit.

¶9 During a December 16, 2004 meeting with Smith Barney, Dillard explained ALMR's financial situation. Smith Barney stated it would be relying on the Trust's guarantee. The Trust subsequently paid the line of credit balance of $499,249.01 and demanded that Schlussel pay one-half. The Trust sent a promissory note for Schlussel to sign, setting forth a twelvemonth repayment term. After receiving no response, the Trustee followed up with a demand letter. Schlussel neither responded nor tendered payment.

Page 7

III. This Litigation

¶10 The Trust sued Schlussel for breach of the Guarantee. Schlussel filed a counterclaim and a third-party complaint against Dillard, Lineberry, ALMR, and Bentley Gallery. The December Payments formed the basis for Schlussel's claims of breach of fiduciary duty, unjust enrichment, tortious interference with business expectancies, fraud, conversion, and ultra vires actions. Schlussel alleged that by making the December Payments from the line of credit, Dillard increased his obligations under the Guarantee and converted the Bentley Gallery into a secured creditor. Schlussel sought compensatory and punitive damages.

A. The Grant Of Partial Summary Judgment

¶11 The Trust moved for summary judgment on its claim against Schlussel for one-half of the $499,249.01 line of credit balance. Schlussel disputed the amount due. He also argued Dillard had agreed to modify the Guarantee so that his earlier contributions would decrease his Guarantee liability to $43,064.

¶12 The trial court granted partial summary judgment to the Trust on the breach of the Guarantee claim, stating, in part: "It is irrelevant that Schlussel has filed counter-claims [sic] separately against the former members of ALMR alleging various acts of misconduct, since those claims are not effective to thwart the enforcement of the guarantee by the Plaintiff

Page 8

Trust for ALMR's actual and undisputed debts." The court held that, as a matter of law, Schlussel was liable for $172,727.76, representing one-half the line of credit balance without the December Payments. It implicitly ruled that a trier of fact would have to determine whether the December Payments were valid debts of ALMR. Schlussel later amended his third-party complaint to include claims against the Trust, including declaratory relief on a right of inspection, breach of fiduciary duty, declaratory

relief for ultra vires actions, tortious interference with business expectations, common law fraud, unjust enrichment, and conversion.

¶13 The Trust moved in limine to exclude evidence at trial regarding Schlussel's liability under the Guarantee and to limit the evidence to whether the December Payments were ALMR's legitimate debts. The Trust argued Schlussel could not relitigate whether the parties had modified the Guarantee to credit Schlussel for every dollar he invested in ALMR. The trial court granted the motion, finding the prior trial judge had implicitly rejected the modification argument by granting the Trust's motion. The court ruled that Schlussel could present his claims, but "[o]n the issue of any discussion of modification as it relates to the guarantee, that will be precluded."

Page 9

B. The Trial

¶14 During the ensuing jury trial, Schlussel dismissed his claims against Dillard and the Trust for declaratory relief and ultra vires acts, along with the tortious interference claims against all parties, and the fraud claim against the Trust. The Trust moved for judgment as a matter of law ("JMOL") on the remaining counts. The court granted JMOL on the claims for unjust enrichment and conversion, fraud by the Trust, and punitive damages. Trial proceeded on the remaining claims.

¶15 The jury delivered verdicts against Schlussel on all claims. It found the December Payments were "valid payment[s] of ALMR." It also rejected Schlussel's breach of fiduciary duty and fraud claims.

¶16 The trial court entered judgment for the Trust and Dillard on April 17, 2009, awarding $249,624.50 in damages, plus interest. The judgment included an award of unspecified costs and $174,039.04 in attorneys' fees based on the Guarantee and the intertwined nature of the tort claims. Schlussel moved for a new trial, which was denied in an unsigned minute entry. The court later filed a First Amended and Consolidated Judgment on February 1, 2010, which incorporated the denial of the new trial motion and specified an amount for costs as well as fees. This timely appeal followed.

Page 10

DISCUSSION

I. Modification of the Guarantee

¶17 Schlussel challenges the grant of partial summary judgment on the breach of Guarantee claim. A court may grant summary judgment if "there is no genuine issue as to any material fact and... the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). In reviewing a grant of summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the superior court properly applied the law. Tierra Ranchos Homeowners Ass'n v. Kitchukov, 216 Ariz. 195, 199, ¶ 15, 165 P.3d 173, 177 (App. 2007). We view the facts and reasonable inferences from those facts in the light most favorable to the party against whom summary judgment was entered. Ruelas v. Staff Builders Pers. Servs., Inc., 199 Ariz. 344, 345, ¶ 2, 18 P.3d 138, 139 (App. 2 001).

¶18 Schlussel contends the trial court erroneously ruled that, as a matter of law, no modification of the Guarantee had occurred or could occur. The court, however, did not state that the Guarantee could not be modified under any circumstance.[2] The relevant question is whether Schlussel came forward with

Page 11

evidence creating a genuine issue of material fact as to his liability for at least $172,727.76. Like the trial court, we conclude he did not.

¶19 In response to the Trust's summary judgment motion, Schlussel alleged that he and Dillard agreed his obligation under the Guarantee would be reduced by sums he contributed to ALMR's operations. As support for this claim, Schlussel cited Lineberry's

affidavit statement that Dillard agreed "she would treat Schlussel's additional capital contributions to ALMR as reductions of his obligation on his guaranty of the credit line." At deposition, though, Lineberry stated that his affidavit statements related to Schlussel's payments to Smith Barney on the line of credit, not to his obligations to the Trust under the Guarantee. Lineberry testified he heard Schlussel say "he could either loan money to A Little More Red to pay operating expenses or he could make payments on the credit line, but he couldn't do both." But Lineberry explained that he knew of no conversations indicating that Schlussel's payments toward the line of credit and his Guarantee obligations were the same. Lineberry said he was not present for any conversation during which Schlussel and Dillard amended the Guarantee. To the best of Lineberry's knowledge, Schlussel was liable to the Trust under the terms of the Guarantee as written.

Page 12

¶20 Schlussel's other evidence offered in opposition to the motion for summary judgment fared no better. At deposition, Schlussel described a January 2003 meeting with Dillard wherein Dillard allegedly agreed to reduce the Guarantee obligation by amounts he contributed to ALMR operations, stating:

> I don't have the financial ability of Bentley Dillard. I never did. And what I was basically saying, if I want to continue to support this venture, I can't do that and pay you back the loan guaranty. I can't do both at that moment in time.

(Emphasis added.) According to Schlussel, the agreement was that "[i]f the guarantee had to be paid off, [the Trustee] would pay it off, and [Schlussel] would have a long period of time to repay her." Schlussel and Dillard allegedly discussed that they "would work it out with regard to the [Trust's] guarantee." Even Schlussel conceded that Dillard did not say he would not have to pay under the Guarantee, and the parties never discussed him making only partial payment.

¶21 We also reject Schlussel's argument that the trial court incorrectly concluded any third-party claims were "not effective to thwart the enforcement of the guarantee." As the Trust points out, Schlussel had not yet asserted third-party claims against the Trust at the time partial summary judgment was granted. Moreover, the court never stated the claims were irrelevant to the amount of any potential judgment against

Page 13

Schlussel. Schlussel obtained a jury trial addressing whether Dillard wrongfully increased the line of credit balance via the December Payments. At trial, Schlussel had ample opportunity to develop his third-party claims.

¶22 Drawing all reasonable inferences in Schlussel's favor, the evidence before the trial court when it granted partial summary judgment at most indicated he could loan ALMR sums for operating expenses in lieu of paying on the credit line "at that moment in time."[3] Schlussel failed to establish a genuine issue of material fact as to his obligations under the Guarantee, with the exception of the December Payments. The trial court properly granted partial summary judgment to the Trust.

II. The Trial Court's Refusal to Revisit Issues

¶23 Schlussel argues the trial court erred by granting the Trust's motion in limine, restricting trial evidence on the Guarantee claim to whether the December Payments were valid ALMR obligations. We review the court's evidentiary rulings for an

Page 14

abuse of discretion. Warner v. Sw. Desert Images, L.L.C., 218 Ariz. 121, 133, ¶ 33, 180 P.3d 986, 998 (App. 2008).

¶24 According to Schlussel, the trial judge should have denied the motion in limine because

summary judgment was "no longer appropriate." His position would have required the court to revisit the partial summary judgment ruling made by the previously-assigned judge.

¶25 A court should refuse "'to reopen questions previously decided in the same case by the same court or a higher appellate court' unless 'an error in the first decision renders it manifestly erroneous or unjust or when a substantial change occurs in essential facts or issues, in evidence, or in the applicable law.'" Assoc. Aviation Underwriters v. Wood, 209 Ariz. 137, 150, ¶ 40, 98 P.3d 572, 585 (App. 2004) (citations omitted). The law of the case doctrine prohibits relitigation of issues already decided and thus "promotes an orderly process leading to an end to litigation." Id. at 151, ¶ 40, 98 P.3d at 586 (citations omitted). Schlussel has not identified a substantial change in fact or law to support relitigating issues resolved by the partial summary judgment.

III. Denial of Schlussel's Rule 50 Motion

¶26 Schlussel contends the court erroneously denied his Rule 50 motion regarding the validity of the December Payments. A trial court should grant JMOL when the facts submitted in

Page 15

support of the claim "have so little probative value that reasonable people could not find for the claimant." Monaco v. HealthPartners of S. Ariz., 196 Ariz. 299, 302, ¶ 6, 995 P.2d 735, 738 (App. 1999). We review the denial of JMOL de novo. Sec. Title Agency, Inc. v. Pope, 219 Ariz. 480, 498, ¶ 83, 200 P.3d 977, 995 (App. 2008). We "view the evidence and all reasonable inferences in the light most favorable to the nonmoving party." Murcott v. Best W. Int'l, Inc., 198 Ariz. 349, 356, 1 36, 9 P.3d 1088, 1095 (App. 2000).

¶27 The trial evidence was sufficient to submit the Trust's claim to the jury. The Trust presented evidence from which a reasonable trier of fact could conclude the December Payments were valid ALMR obligations. ALMR owed Bentley Gallery for sums advanced to cover ALMR's payroll and other expenses. During telephone calls and e-mail exchanges, the ALMR members agreed that Bentley Gallery should be repaid as part of the process of shutting down ALMR.

¶28 The Trust was reimbursed for the amount it paid toward the line of credit in excess of Schlussel. There was evidence that Schlussel and the Trust (which succeeded Dillard) had agreed to be equal ALMR partners and make equal financial contributions. Dillard testified she also obtained Schlussel's verbal approval for the equalization payment to the Trust.

Page 16

¶29 Schlussel argued the December Payments were improper because they violated section 3.6(c) of the Operating Agreement, which states:

> Notwithstanding the foregoing, if any Member(s) shall have personally guaranteed any obligations of the Company, whether directly or indirectly, the Company shall not take any action that results in an incurrence of indebtedness by, or the making of expenditures by, the Company, in either case in excess of $25,000, without the prior written consent of such Member(s).

(Emphasis added.) According to the Trust, section 3.6 is inapplicable because: (1) the December Payments did not increase ALMR's indebtedness, and (2) the ALMR indebtedness was incurred in increments that never exceeded $25,000.

¶30 Dillard testified Schlussel never invoked this provision, and ALMR had incurred larger expenses without obtaining the members' written consent. Schlussel also testified that "[w]hile we were operating the business, no, we

never really required [the written authorization requirement]" and "we waived it all of those times."[4] Schlussel now maintains he admitted waiving the requirement only during the time ALMR was in operation; but he fails to confront other evidence that

Page 17

ALMR members were informed of and did not timely object to the December Payments.

¶31 "No rule is better established than that the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury." State v. Clemons, 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974); see also State v. Lehr, 201 Ariz. 509, 517, ¶ 24, 38 P.3d 1172, 1180 (2002). In light of the conflicting trial evidence, the court properly denied Schlussel's Rule 50 motion.

¶32 After the jury rendered its verdict, Schlussel moved for a new trial, contending for the first time that the December Payments violated Arizona's Limited Liability Company Act, Arizona Revised Statutes ("A.R.S.") sections 29-681(D) and 29-703. He re-urges this claim on appeal. Schlussel, however, waived this argument by failing to raise it before or during trial. See Conant v. Whitney, 190 Ariz. 290, 293, 947 P.2d 864, 867 (App. 1997) (holding that an issue is waived when raised for the first time in a motion for new trial); Watson Constr. Co. v. Amfac Mortgage Corp., 124 Ariz. 570, 582, 606 P.2d 421, 433 (App. 1979) ("The first time this issue was presented to the trial court, was after the verdict, at the motion for new trial. This is simply too late.").[5]

Page 18

IV. Jury Instructions

¶33 Schlussel contends the trial court incorrectly instructed the jury regarding the elements of fiduciary duty.

The instruction the court gave reads:

> Mark Schlussel, Glen Lineberry, and the Trust are members of ALMR. (Ms. Dillard previously was a member of ALMR), a limited liability company. As members in a limited liability company, they must deal fairly and in good faith with each other concerning the business and disclose to each other all material facts relating to the company's affairs, or they are subject to liability for breach of fiduciary duty.
> Mr. Schlussel claims that the Trust and/or Ms. Dillard breached their fiduciary duty to Mr. Schlussel. To establish this claim, Mr. Schlussel must prove:
>
> 1. The Trust and/or Ms. Dillard breached their fiduciary duty;
> 2. The Trust and/or Ms. Dillard's breach of fiduciary duty was a cause of Mr. Schlussel's damages; and
> 3. Mr. Schlussel's damages.

(Emphasis added.) The parties offered stipulated changes to the court's proposed instruction on fiduciary duty during off-the-record telephone conversations. Schlussel asked that the word "utmost" be inserted in front of the phrase "good

Page 19

faith," but the trial court declined to make that addition.[6] The "utmost good faith" language appears in the Revised Arizona Jury Instructions ("RAJI") on fiduciary duty. See RAJI (Civil), 4th ed., Commercial Torts Instruction 1D (Fiduciary Duty--Plaintiff's Burden of Proof (Partner)).

¶34 We review a court's jury instructions for an abuse of discretion. A Tumbling-T Ranches v. Flood Control Dist., 222 Ariz. 515, 533, ¶ 50, 217 P.3d 1220, 1238 (App. 2009).

Whether a particular instruction correctly states the law is an issue we review de novo. Id. Our task is to assess the instructions as a whole to determine whether the jury was properly guided in its deliberations. Pima County v. Gonzalez, 193 Ariz. 18, 20, ¶ 7, 969 P.2d 183, 185 (App. 1998). An instruction will warrant reversal if it was both harmful to the complaining party and directly contrary to the rule of law. AMERCO v. Shoen, 184 Ariz. 150, 159, 907 P.2d 536, 545 (App. 1995) (finding no error in a fiduciary duty instruction because, viewed as a whole, it gave the jury the proper rules to apply). We will not overturn a verdict on the basis of an improper instruction "unless there is substantial doubt whether the jury was properly guided in its

Page 20

deliberations." Barnes v. Outlaw, 188 Ariz. 401, 405, 937 P.2d 323, 327 (App. 1996), vacated in part on other grounds, 192 Ariz. 283, 964 P.2d 484 (1998).

¶35 A fiduciary duty requires the exercise of the "utmost good faith." See Ohaco Sheep Co. v. Heirs of Ohaco, 148 Ariz. 142, 145, 713 P.2d 343, 346 (App. 1986) ("Partners owe a duty of utmost good faith in dealing with each other."); Jerman v. O'Leary, 145 Ariz. 397, 402, 701 P.2d 1205, 1210 (App. 1985) (requiring observance of the utmost good faith when one partner sells an interest to another partner). But even assuming the trial court should have included the "utmost good faith" language, Schlussel has failed to demonstrate corresponding prejudice sufficient to overturn the verdict.

¶36 It is clear from the instructions that the issue for the jury to decide was whether Dillard improperly directed the December Payments. In closing, Schlussel's counsel argued:

> Did the trust breach its fiduciary duty when it took $85,000 on December 3rd, again, without Mr. Schlussel's authorization? Frankly, I can't think of anything more self-serving than that. Mr. Schlussel, on this second claim for breach of fiduciary duty, should be awarded as damages one-half of the 152,000 [sic] that the trust stole. That's what it is, it's stealing, on December 3rd, 2004.

Under Schlussel's theory of the case, the Trust necessarily breached both a duty of "mere" good faith and a duty of utmost

Page 21

good faith because it "stole" funds. The jury obviously disagreed, finding the December Payments to be proper. In this context, any arguable deficiency in the instruction's wording did not prejudice Schlussel.[7]

CONCLUSION

¶37 We affirm the judgment of the superior court. We award the Trust its costs and reasonable attorneys' fees incurred on appeal pursuant to the Guarantee, which states: "Guarantor agrees to pay all of the Family Trusts [sic] reasonable attorney's fees and other costs and expenses which may be incurred by the Family Trust in the enforcement of this guarantee." See Bennett v. Appaloosa Horse Club, 201 Ariz. 372, 378, ¶ 26, 35 P.3d 426, 432 (App. 2001) (awarding fees to a prevailing party pursuant to a contract is mandatory). We also award fees to the Trust and Dillard regarding Schlussel's tort claims, which are inextricably intertwined with issues relating

Page 22

to the Guarantee. See City of Cottonwood v. James L. Fann Contracting, Inc., 179 Ariz. 185, 194, 877 P.2d 284, 293 (App. 1994).

MARGARET H. DOWNIE, Judge

CONCURRING:

DANIEL A. BARKER, Presiding Judge

MICHAEL J. BROWN, Judge

Notes:

[1.] The Trust and Lineberry held ownership interests in the Bentley Gallery. The Bentley Gallery had two locations: one in Scottsdale and another in Phoenix, known as the Bentley Projects.

[2.] The trial court stated: "the plain wording of the Guarantee makes it clear that Schlussel as Guarantor waived any defenses he might have against the enforcement of the Guarantee for a debt of A Little More Red."

[3.] The Trust correctly notes that Schlussel cites trial evidence to support his challenge to the grant of partial summary judgment. Because this evidence was not before the trial court when it ruled on the motion, we decline to consider it in the context of the partial summary judgment grant. See GM Dev. Corp. v. Cmty. Am. Mortgage Corp., 165 Ariz. 1, 4-5, 795 P.2d 827, 830-31 (App. 1990) (holding that deposition transcripts, which were not part of the record before the trial court when it granted partial summary judgment, could not be considered on appeal). In contrast, Schlussel's reliance on trial evidence to support his Rule 50 arguments is appropriate.

[4.] In successfully opposing the Trust's JMOL motion on the breach of guaranty claim, Schlussel's counsel stated: "And our only argument in the briefing and Mr. Schlussel's response to the motion for summary judgment, our only argument on those two payments was that they were invalid because they violated the operating agreement."

[5.] Schlussel's reliance on United Bank of Arizona v. Allyn, 167 Ariz. 191, 805 P.2d 1012 (App. 1990), is misplaced. Allyn dealt with an argument raised in a new trial motion after a grant of summary judgment. Id. at 193-94, 805 P.2d at 1014-15; see, e.g., Maganas v. Northroup, 112 Ariz. 46, 48, 537 P.2d 595, 597 (1975) (holding that a motion for new trial may be directed against a summary judgment).

[6.] Schlussel also contends the court should have instructed that the members owed "a special duty to one another, which is called a fiduciary duty." Schlussel has not identified where in the record he made this request and has not explained how the absence of this language prejudiced him.

[7.] Our resolution of this issue obviates the need to discuss the parties' remaining arguments.
